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No. 85-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY,
Appellant,

v.

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,
Appellees.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to Rule 16.1(b), Appellees move to dismiss this appeal on the ground that the federal questions sought to be reviewed were not timely and properly raised before the Supreme Court of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 14, Mississippi Supreme Court.

PETITION FOR REHEARING

(a) Within fifteen (15) days after a decision is handed down on the merits of a case or on a motion, any party asserting that an error of law or fact was committed may file a written petition for rehearing, [and] . . . shall briefly and distinctly set forth its

grounds. The petition for rehearing shall be accompanied by a brief in support thereof . . . .

STATEMENT OF THE CASE

Appellant is a debit insurance company.[1] In 1981 it had a net worth of $470,000,000 and net profits for that fiscal year of $134,000,000. The typical policy issued is for a small amount and the typical insured is a person of low income who has never purchased insurance before.

Carolyn and Marvin Miller fit the pattern. Neither possesses a high-school education, and they live a life best described as on the edge of a marginal economic base. When solicited by two agents of Appellant (Messrs. Dillon and Blount), Mrs. Miller orally responded to questions concerning the health of her child by explaining that he had a heart murmur. The agents, however, omitted this information from the application form they

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[1] The history and current status of this industry has been recently reviewed:

> [With respect to debit insurance] [t]hese are tiny face-amount policies, still sold in some of America's poverty pockets . . . . Under the terms of these whole life policies, an insurance agent comes by in person, weekly, to collect the 50 cents or dollar that is due, checking off payments in his debit book. For the poor who could save in no other way, it was argued, this was worthwhile insurance. Yet these policies were, and are, grotesquely inefficient. Of each dime "saved," perhaps a penny went to pay the actual cost of insurance, and a penny or two more built up "cash value"—but most of the dime went to expenses, overhead and profit. Horror stories abound of families being sold five and ten such penny-rate policies—on the lives of their children, no less, instead of their breadwinner —when the coverage was not needed, or when the same dollars, combined to purchase a single term policy, could have purchased five or ten or twenty times more coverage . . . . There were still 98 million home-service life insurance policies in force in 1980 (. . . 36 million [of which are] monthly debit plans), with an average face value of less than $1,600 each.

[A. TOBIAS, THE INVISIBLE BANKERS 258-9 (1982)].

prepared and forwarded to the Appellant. Subsequently, following the child's death, Appellant refused to pay the policy amount ($2,500) to the Millers on the basis of "false statements" on the application. The practices of Appellant uncovered at the trial in which the jury awarded $2,500 in actual damages and $350,000 in punitive damages elicited the following analysis from one Justice of the Mississippi Supreme Court:

> In all likelihood Dillon's and Blount's sole source of income from National Life was on commission. Furthermore, their largest commission came from the initial premium paid on an insurance policy.
>
> If the policy was issued following the application, they kept the commission. If the policy was not issued, the premium had to be refunded.
>
> When the soliciting agent, rather than the applicant fills in the application, it is naive to assume there is not a strong temptation on his part to ignore an answer the applicant gives which would prevent the company's issuing a policy, which would "knock out" a sale.
>
> The insurance companies surely know this. Yet, they permit their agents to be put in such conflict of interest positions, only to assert later, with a presumably straight face, that precisely what happened in this case should never occur.
>
> Not only this, having approved a system of practice which encourages giving false answers (by their own agents) to questions on their application forms, they use the deceit of their own employees as a weapon to deny a claim.
>
> It would be quite simple to remove from the agent any responsibility or authority to fill in the application form. The question then follows, why don't insurance companies do so?
>
> The answer, for insurance companies such as this defendant, is not savory.

> . . . Did National Life know, or have any reason to know, that Blount and Dillon had been told by Mrs. Miller that her son had a heart problem when the application was taken? When she made the claim for her son's death, she told the company she had told Dillon and Blount the truth. Yet the company waited eleven months after rejecting her claim, and just two weeks before trial before it ever so much as questioned Dillon and Blount, its own employees, about the circumstances surrounding the application.
>
> . . . National Life could play the odds with its practice of encouraging agents to submit false applications and then be able to deny a claim because the application was false. In this case National Life has played the odds and lost.
>
> A punitive damages award in this case is quite proper. Again, a court has been called upon to redress grievances which could be avoided by proper state regulation of insurance company practices.

[Jurisdictional Statement 20a-21a].

After the jury's verdict was entered, Appellant filed a "Motion for Judgment, Corrected Judgment, or New Trial." Grounds for setting aside the punitive damage award were limited to the following:

> That the verdict of the jury is against the overwhelming weight of the testimony and there is no testimony whatsoever to justify a verdict for punitive damages.
>
> . . . .
>
> That, if the plaintiffs were entitled to recover anything whatsoever in the cause, which is denied, the verdict is excessive and evidences that the jury was biased and prejudiced against said defendant.

[*Id.* at 71a].

The motion was denied. Appeal to the Mississippi Supreme Court followed. In its brief to the court,

Appellant confined its argument on the punitive damages issue to the contention that it was "excessive" under applicable Mississippi decisions. *Id.* at 109a-110a, 123a. Following affirmance and imposition of the mandatory fifteen percent appeal penalty pursuant to Miss. Code Ann. § 11-3-23 (Supp. 1982), *id.* at 22a, Appellant filed a petition for rehearing. This document raised, for the first time, the issue of whether the 15% penalty provision violated the Fourteenth Amendment.[2] The *only* basis for reconsideration of the punitive damage award, on the other hand, was limited to the following contention:

> A party making an unsuccessful factual defense should not be subjected to a punitive damage instruction.

[*Id.* at 26a].

Thereafter, in a discrete portion of its brief in support of the petition for rehearing, Appellant inserted one sentence in which reference was made to a violation of the Eighth Amendment and/or "due process rights." *Id.* at 32a. Following denial of rehearing without opinion, Appellant now comes to this Court arguing that plenary review of all constitutional issues "raised" and "rejected" on rehearing is in order.

ARGUMENT

The Eighth Amendment and Due Process Issues:—The general rule, of course, is that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration" by this Court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FED. PRAC. & PROC. § 4022 at 701 (1977). While Appellant attempts to bring its case within excep-

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[2] As pointed out, Appellant also raised the issue in a Motion to Correct Mandate. Jurisdictional Statement 3.

tions to this rule, its analysis fails to deal with one serious problem: the petition for rehearing did not raise any constitutional claim with respect to the punitive damage award.[3]

Rule 14 of the Mississippi Supreme Court requires the filing of *two* documents at the rehearing stage: a petition which "briefly and distinctly set forth its grounds," and a "brief in support thereof." As noted in the statement of the case, the *only grounds* asserted in the *petition* for the granting of a rehearing alleged a violation of state law, *i.e.*, "[a] party making an unsuccessful factual defense should not be subjected to a punitive damage instruction." Having failed to "distinctly set forth" any constitutional deficiency with respect to the punitive damage award in its petition (as compared to the sentence reference found in the brief in support thereof), the issue is not appropriate for full review by this Court.

Mississippi's Penalty Provision and the Equal Protection Challenge:—Section 11-3-23 is a mandatory provision, *i.e.*, "the Supreme Court *shall* render judgment against the *appellant* for damages at the rate of fifteen percent . . . ." (emphasis added). This fact has led the Mississippi Supreme Court to make the following proposition clear to all members of the bar:

> Every losing litigant is given an automatic right of appeal. When deciding whether to exercise that right, the penalty statute is there for him to consider. If he is successful on his appeal, of course, he incurs no penalty. *If he loses, however, he must pay the price, a price he well knows and may easily calculate before giving his notice of appeal.*

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[3] Appellant apparently has reached the same conclusion. *See, e.g.*, Jurisdictional Statement 10 (requesting a "hold" on the case pending disposition "of any other cases . . . which . . . may be suitable for decision of [*sic*] the Excessive Fines Clause" in order that the perceived "new constitutional rule" can be applied to the case.

[*Collins v. North Miss. Sav. & Loan Ass'n*, 445 So. 2d 828, 832 (Miss. 1984) (emphasis added)].

Appellant had adequate notice of the proposition that if the trial court's judgment was affirmed, the penalty would automatically attach. The fifteen percent penalty of Section 11-3-23 is imposed unless the appeal is successful and an appellant's only defense is to contest the statute's applicability (on constitutional or other grounds) on appeal. This is *exactly* the technique employed by counsel in previous cases. *Cunningham v. Cunningham*, 423 So. 2d 136, 138 (Miss. 1982) (court directly addresses question on appeal as to whether appellee was entitled to statutory damages); *Collins v. North Miss. Sav. & Loan Ass'n*, *supra* at 831 (addressing applicability of 11-3-23 on appeal). *See also South Cent. Bell v. Adson*, 474 So. 2d 584 (Miss. 1985) (direct appeal; decision that 15% penalty was applicable to employer in worker's compensation case); *Lumberman's Mut. Cas. Co. v. Rhodes*, 459 So .2d 244, 246 (Miss. 1984) (direct appeal; determination that funds were subject to penalty).

Appellant argues, however, that there is precedent for the proposition that the Mississippi Supreme Court entertains post-judgment motions by unsuccessful appellants attacking the statute's constitutionality. As a general proposition, the fact that a state supreme court employs its equitable powers in certain instances to grant petitions for rehearing has no bearing on this Court's rule precluding review of questions first raised in this manner.[4] Even more important, however, the

[4] Appellees agree with Appellant's apparent conclusion that this Court's decision in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), has no bearing on the correct disposition of the instant case. First, there is no argument that petitions for rehearing with respect to Section 11-3-23 have not been handled "evenhandedly." *Id.* at 264. Second, this Court's citation to *Barr v. City of Columbia*, 378 U.S. 147, 149 (1964), indicates that *Hathorn* is a decision compatible with the

case relied upon by Appellant, *Wallace v. Jones*, 360 So. 2d 932 (Miss. 1978), involves a situation in which a successful *appellee* filed a post-decision motion contending that the court was in error by *not* complying with the mandatory statutory obligation to impose the penalty. It is in this limited context, *and only this context*, that the Mississippi Supreme Court has entertained arguments on *rehearing* (including those of a constitutional dimension) by appellants that the penalty should not be imposed. *See also, Peoples Bk. & Trust Co. v. L & T Developers, Inc.*, 437 So. 2d 7 (Miss. 1983) (motion for assessment of statutory damages entertained; defense by opposing party based on, among other things, constitutional grounds).

This line of decisions establishes the following precedent. First, those deciding to appeal are on notice that an affirmance will result in the assessment of the penalty if the case falls within the coverage of Section 11-3-23. Second, inasmuch as the penalty is mandatory, all arguments relating to its inapplicability must be presented on appeal. Third, absent a decision to attack the statute on appeal, the *only* remaining opportunity to contest the mandatory penalty on constitutional grounds arises only if all three of the following have occurred: (1) the Mississippi Supreme Court affirms the trial court's decision;

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proposition that state procedural rules that are "deliberately applied to avoid consideration of federal rights" will not preclude review by this Court. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FED. PRAC. & PROC. § 4028 at 429 (Supp. 1985). See also *id.* at 431 (*Hathorn* may have been decided because of "an unspoken fear that the state court was applying its rehearing limits so as to discriminate against federal rights.") Third, *Hathorn* can be read to provide an exception to the general rule against review of questions presented for the first time in a petition for rehearing with respect to issues "that the parties could have foreseen but that [arise] with urgency" only after a court upholds part of a challenged statute. 457 U.S. at 264. This, of course, is not the procedural posture of the instant case.

(2) the judgment entered fails to award the penalty; and (3) the *appellee* files a proper motion contending that error has been committed. It is at this point that *Wallace v. Jones* supports the proposition that a constitutional challenge by an appellant in the form of a response may be sufficient to permit the Court to entertain the argument.

In *Aetna Life Ins. Co. v. Lavoie*, slip op. at 14 (No. 84-1601, April 22, 1986), this Court concluded that the issue of mandatory assessments of percentage penalties against unsuccessful appellants raises an important issue "which, in an appropriate setting, must be resolved . . . ." An "appropriate setting" is obviously not one in which the issue is not raised and argued on appeal and is brought to the attention of a state supreme court in a petition for rehearing. Time and again this Court has recognized that "due regard for the appropriate relationship [with] . . . state courts requires [it] to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *McGolderick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). As emphasized in *Webb v. Webb*, 451 U.S. 493, 499 (1981):

> There are powerful policy considerations underlying the . . . rule that the federal challenge to a state statute . . . be presented first to the state courts. Those considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

The presence of an adequate and independent state ground in the instant case precludes review.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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